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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 958

EDDIE CAMPBELL, JR., *Petitioner*

v.

STATE OF SOUTH CAROLINA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Petitioner seeks a writ of certiorari to review the judgment of the Supreme Court of South Carolina, S. C. , 96 S.E. 2d 476, entered on January 15, 1957, affirming a judgment of the Court of General Sessions for Chesterfield County, South Carolina, convicting him of perjury. (App. B). Petition for rehearing was denied February 1, 1957. (App. C).

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

Whether petitioner was deprived of liberty without due process of law as guaranteed by the Fourteenth Amendment where the verdict of the jury convicting him of perjury was necessarily based on the following evidence: (1) a statement signed by petitioner at a closed fire marshal inquest where petitioner was not represented by nor entitled to counsel; (2) the testimony of the state and federal agents as to what was said and done when said statement was taken; and (3) the testimony of petitioner as a witness repudiating the said statement at the prior arson trial of his father-in-law which was given at a time when petitioner was an involuntary witness, was not informed of his privilege against self-incrimination, and was not represented by counsel.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fourteenth Amendment to the Constitution of the United States, Section 1:

* * * *

"No State shall . . . deprive any person of life, liberty, or property, without due process of law * * *"

2. The General Statutes of North Carolina (1950), Volume 2 B, p. 729.

Chapter 69. *Fire protection*

Section 69-3. *Powers of Commissioner in Investigations.* The Insurance Commissioner, or his deputy appointed to conduct such examination, has the powers of a trial justice for the purpose of summoning and compelling the attendance of witnesses to testify in

relation to any matter which is by provisions of this article a subject of inquiry and investigation, and may administer oaths and affirmations to persons appearing as witnesses before them. False swearing in any such matter or proceeding is perjury and shall be punished as such. The Commissioner or his deputy has authority at all times of the day or night, in performance of the duties imposed by the provisions of this article, to enter upon and examine any building or premises where any fire has occurred, and other buildings and premises adjoining or near the same. All investigations held by or under the direction of the Commissioner or his deputy may, in their discretion, be private, and persons other than those required to be present by the provisions of this article may be excluded from the place where the investigation is held, and witnesses may be kept apart from each other and not allowed to communicate with each other until they have been examined.

3. Article 1, Sec. 17 of the Constitution of South Carolina:

> "No person . . . shall be compelled in any criminal case to be a witness against himself." (Cf. construction in *Town Council* v. *Owens*, 61 S.C. 22, 39 S.E. 184 (1901)).

4. Code of Laws of South Carolina (1952), Volume 2, Title 16, *Crimes and Offenses,* Chapter 4. *Offenses Against Public Justice,* pp. 772-773.

Section 16-203. *False swearing before persons authorized to administer oaths.* Whoever shall, willfully and knowingly, swear falsely in taking any oath required by law, administered by any person directed or permitted by law to administer such oath, shall be

guilty of perjury and, on conviction, incur the pains and penalties of that offense.

Section 16-204. *Additional permissible punishment for perjury.* Besides the punishment already to be inflicted by law for so great crimes, the court or judge before whom any person shall be convicted of willful and corrupt perjury or subornation of perjury may order and send such persons to the state penitentiary, there to be kept to hard labor for any term or time not exceeding the term of seven years.

STATEMENT

Petitioner, a 21 year old colored Marine, (Tr. A 154),[1] on September 6, 1954, was at home near Chesterfield, South Carolina, on leave. (Tr. B 1-2). He had returned from Korea and had been hospitalized as a result of his tour. (Tr. A 152). His military record is highly impressive. (Tr. A 153). On September 6th, he was a passenger in a 1951 Ford automobile owned and driven by his father-in-law, Preston Fleming (Tr. A 147), when the car caught fire and burned. (Tr. A 147, 149).

Fleming filed a claim for the fire loss. The insurance company adjuster contacted petitioner on November 4, 1954 (State Ex. 3) who stated that the fire began spontaneously beneath the dashboard of the vehicle. (Tr. A 65-67).

On February 25, 1955, petitioner was at Camp Lejeune, North Carolina, (Tr. A 14) and had been in

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[1] Key to Record references: *Tr. A* refers to transcript of petitioner's perjury trial; *Tr. B* refers to transcript of *State* v. *Fleming*, arson trial of petitioner's father-in-law, admitted in evidence in petitioner's perjury trial as State Ex. 1.

sick bay for bad nerves and high blood pressure. (Tr. B 44; Tr. A 152). On that day he was called to an interrogation by W. G. O'Neal, a Deputy Fire Marshal of the Insurance Department of the State of *North* Carolina, Special Agent Thomas B. Todd of the National Automobile Theft Bureau, and Master Sergeant John Wills, United States Marine Corps, an agent of the Criminal Investigation Division at Camp Lejeune. (Tr. A 16, 17). All the hallmarks of officiality surrounded the proceeding and O'Neal purported to place petitioner under oath although he was not authorized to administer oaths in investigations of this type. (Tr. A 15). Petitioner was neither represented by counsel nor accompanied by any witness. He had never been to a C.I.D. office before and was rather afraid of courts and "not following orders." (Tr. A 153).

As a result of this proceeding petitioner signed a statement (Def. Ex. C) repudiating his earlier statement to the insurance adjuster and stating that his father-in-law deliberately burned the car in order to obtain another car. It denied any complicity of petitioner in the alleged arson and attempted to explain petitioner's earlier statement on the theory that petitioner had been merely trying to help his father-in-law. The statement contained purported comments of other persons to petitioner which were palpably hearsay, and it was shrouded in the usual ritualistic assertions that petitioner was making the statement voluntarily with knowledge of his rights. (Def. Ex. C)

The insurance company did not pay Fleming's claim and he filed suit to recover on his fire policy. Shortly thereafter, in June, 1955, Fleming was indicted for arson. (Tr. B).

On November 4, 1955, petitioner was again called in at Camp Lejeune. Special Agent Todd and Horace McLain, an Assistant to the Insurance Commissioner of the State of South Carolina, questioned petitioner. (Tr. A 93, 100). He was not afforded counsel. There were no witnesses to what took place. Special Agent Todd and McLain testified that petitioner reaffirmed his February statement at Camp Lejeune and stated that he would testify in accordance with the said statement at the arson trial of his father-in-law. (Tr. A 93-95, 99-101). Petitioner denied these statements. (Tr. A 178).

Prior to the date set for the arson trial of Fleming, petitioner spoke to counsel representing Fleming and told him, on the advice of a Marine officer (Tr. A 175), of the statement he had signed in February. (Tr. B 28). He denied the truth of this statement and stated that he would testify contrary to that statement. (Tr. B 28). Counsel informed the county solicitor before trial of this fact. (Tr. B 30; Tr. A 40, 44).

On November 14, 1955, the arson trial of Fleming began. Despite his knowledge that the youth would testify that Fleming had not set fire to the car, the county solicitor nevertheless had him brought to the trial by process and called him as his first and sole witness. (Tr. B 1). The examination was adversary in nature and was directed toward demonstrating the conflicts in the February statement taken at the fire marshal inquest at Camp Lejeune and the courtroom testimony of petitioner. The county solicitor admitted to the trial court that he had been informed of petitioner's repudiation of the February statement. (Tr. B 30). It is clear that this court proceeding was only in-

tended to serve as a basis for securing petitioner's testimony under oath repudiating what was contained in the February statement. Petitioner was not represented by counsel. (Tr. B 1) He was not informed that he could not be compelled to incriminate himself (Tr. B 1) He was not familiar with court proceedings and had never been in court before. (Tr. B 35) He testified in substance that:

(1) Fleming had nothing to do with wilfully burning the car; (Tr. B 1-10)

(2) The February statement signed by petitioner which asserted that Fleming had wilfully burned the car was false. (Tr. B 24, 33)

(3) The car burned accidentally. (Tr. B 1-10)

(4) The February statement resulted from the fact that the agents had told petitioner to say something untrue at Camp Lejeune, had threatened him, and had told petitioner he could be prosecuted if he did not make such a statement; (Tr. B 13, 14, 38)

(5) Petitioner had never read the statement and could not read the statement; (Tr. B 17, 18)

(6) Petitioner had said nothing on November 4 to Special Agent Todd and McLain about the testimony he would give, and did not tell them that his February statement was true or that he would repeat it at the trial of Fleming. (Tr. B 22, 26, 33)

Following petitioner's testimony, *the county solicitor moved for a directed verdict in favor of the defendant Fleming,* and ordered petitioner held for perjury. (Tr. B 49, 50) The State had no other witnesses.

Petitioner was indicted for perjury in violation of Section 16-203 of the Code of Laws of South Carolina (1952) on February 1, 1956. (App. A) The indictment alleged that he wilfully, knowingly and corruptly swore falsely when he testified at the arson trial to the facts recited above. The alleged false statements were incorporated in an omnibus count of the indictment. (App. A)

At the perjury trial dubious evidence (much of which was later stricken) was introduced by Respondent to the effect that the condition of the car indicated that the fire had not started accidentally. (Tr. A 84-91). In addition to the testimony of petitioner (Tr. A 148-150) and Fleming (Tr. A 182) denying the arson, testimony of other witnesses established that the fire could have been caused by a short circuit of the wires under the dashboard. (Tr. A 82-83; 108; 113-114; 116-117; 126-129) In addition, Agent Todd, corroborated by his associates Sergeant Wills and O'Neal denied that petitioner had been threatened, denied that petitioner had been informed he might be prosecuted if he failed to make a statement, stated that petitioner had been informed of his right to remain silent and denied that petitioner was told to to say anything untrue at the time of the February inquest at Camp Lejeune. (Tr. A 23, 33-36, 68-71) Furthermore, Agent Todd testified that petitioner had read the statement before signing it. (Tr. A 93) Todd, corroborated by McLain, also testified that petitioner had affirmed the February statement and expressed his willingness to testify in accordance with it at a second meeting at Camp Lejeune on November 4th. (Tr. A 94, 100, 101)

Petitioner stated that he had testified truthfully at Fleming's arson trial and affirmed his testimony of

the manner in which the February statement had been procured and the happenings at the meeting of November 4th. (Tr. A 148, 155, 156) Again, he recounted his fear of court-martial unless he did what the agents wanted. (Tr. A 164) He specifically denied that he had been informed of his right to remain silent at the time the February statement was taken. (Tr. A 154). He admitted on examination by the State that the February statement was essentially false but insisted he was under duress, frightened, was confused and misled (Tr. A 161-179). Agent Todd tried the same tactics on the older Fleming but they did not work (Tr. A 183-4).

Necessarily there was no corroboration of his testimony, as he was the only person other than his interrogators present at the crucial times.

The jury returned a general verdict of guilty. This verdict necessarily was predicated upon (a) the February statement, (b) the testimony of the agents as to what was said and done when it was taken, and petitioner's testimony at the arson trial of Fleming going to (a) and (b).

Petitioner was sentenced to imprisonment at hard labor for two years, (App. B) and, as this Court may judicially notice, is subject to civil and penal sanctions under the Uniform Code of Military Justice and Marine Corps Regulations.

Thereafter, Preston Fleming's civil suit for his fire loss was tried out in the same courthouse. No defense of incendiarism was interposed and Fleming secured judgment (see records in the office of the Clerk). A fair reading of the record of the perjury trial overwhelmingly indicates that the fire was not of incendiary origin.

HOW THE FEDERAL QUESTION WAS RAISED

Petitioner objected to the admission of the statement prepared at the C.I.D. by the agents in February, (Tr. A 20), the testimony of Master Sergeant Wills concerning the manner in which the February statement was taken, (Tr. A 74), and the admission of petitioner's solo performance at the arson trial of Fleming (Tr. A 13). Petitioner also requested an instruction setting forth his contention that his testimony at the arson trial was compelled. (Tr. A 201; denied, 193-199). In his Motion for New Trial the admission of petitioner's prior testimony was again objected to upon the grounds:

"*That the examination* at the trial of *State* v. *Fleming* as introduced in the record at the trial of *State* v. *Campbell* compelled the witness and defendant to give evidence against himself in violation of State and Federal Constitutions." (Emphasis supplied) (App. D).

The Court below peremptorily dismissed these contentions without citation of authority, S.C. , 96 S.E. (2d) 476, 480. (App. B) Although petitioner emphasized the self-incriminatory aspect of the testimony given at the arson trial and did not explicitly label his assignment of error as deprivation of liberty without due process of law when before the Supreme Court of South Carolina, the basic substantive objection to guilt being predicated upon such evidence was clear and intrinsic. In any event, as four justices of this Court have recently pointed out, "when a person is to be imprisoned as the result of a proceeding in which he was denied his constitutional rights, we should not be anxious to conclude that he

has failed to raise the constitutional question in the correct procedural form." *In re Groban,* 352 U.S. , 1 L. Ed. 2d 376, 385, decided February 25, 1957, dissenting opinion of Mr. Justice Black. Cf. *Aetna Ins. Co.* v. *Kennedy,* 301 U.S. 389, 393; *Hodges* v. *Easton,* 106 U.S. 408, 412.

REASONS FOR GRANTING THE WRIT

Petitioner was deprived of liberty without due process of law when he was convicted of the crime of perjury as a result of the use of a statement obtained at an inquest where he was not represented by nor entitled to counsel, the testimony of the agents concerning what happened at this interrogation, and his own testimony given at a prior trial when he was an involuntary witness, was not represented by counsel, and was not informed that he could not be compelled to incriminate himself.

Petitioner's conviction rests squarely upon his testimony at the trial of Preston Fleming, the February statement alleged to have been made by him at Camp Lejeune, and the testimony of the agents as to what happened at the February and November inquests. A conviction of perjury which rests upon evidence of this type under the facts of this case is "repugnant to that fundamental fairness essential to the very concept of justice," and hence constitutes a deprivation of liberty without due process of law. Cf. *Lisenba* v. *California,* 314 U.S. 219, 236. There was no substantial untainted evidence upon which the jury could have predicated its verdict without regard to the evidence in question, as in *Stein* v. *People of State of New York,* 346 U.S. 156 (1953). No conviction could have occurred without the challenged evidence, and hence reversal is required if the admission of the evidence violated the Fourteenth Amendment. *Ashcraft* v. *Tennessee,* 322 U.S. 143; *Fikes* v.

Alabama, 352 U.S. , 1 L. ed. 2d 246, decided January 14, 1957.

It is imperative that the circumstances giving rise to the evidence in question be examined.

A. The February statement and the testimony of the agents concerning it

Petitioner signed the February statement following an inquest conducted at Camp Lejeune under the aegis of the United States and the State of North Carolina. At the "trial" of Preston Fleming he testified that the statement had been induced by threats, including prosecution, if he did not make such a statement; and denied being informed of his right to remain silent. He was then tried for perjury not only for making a contrary statement subsequently under oath, but for allegedly falsely stating the circumstances under which the first statement was made. To prove its perjury case, Respondent relied on the February statement, the testimony of the state and Federal agents who took the statement, and the sworn testimony of petitioner at the arson trial.

Petitioner was not represented by counsel nor accompanied by any witness at the Camp Lejeune interrogations. Consequently, he had only his uncorroborated testimony with which to meet the united testimony of the state and Federal agents.

Thus, the exact factual situation predicted by four justices of this Court less than three months ago has taken place to the manifest prejudice of an accused. In *In re Groban,* 352 U.S. , 1 L. ed. 2d 376 , decided February 25, 1957, Mr. Justice Black in his dissenting opinion in which he was joined by the Chief Justice, Mr. Justice Douglas, and Mr. Justice

Brennan stated the probable result of investigations of this type conducted when an accused was not represented by counsel:

> "A secret examination such as the deputy proposed to conduct is fraught with dangers of the highest degree to a witness who may be prosecuted on charges related to or resulting from his interrogation... The witness has no effective way to challenge his interrogators' testimony as to what was said and done at the secret inquisition. The officer's version frequently may reflect an inaccurate understanding of an accused's statements or, on occasion, may be deliberately distorted or falsified. While the accused may protest against these misrepresentations, his protestations will normally be in vain. This is particularly true when the officer is accompanied by several of his assistants and they all vouch for his story. But when the public, or even the suspect's counsel, is present the hazards to the suspect from the officer's misunderstanding or twisting of his statements or conduct are greatly reduced.
>
> "The presence of legal counsel or any person who is not an executive officer bent on enforcing the law provides still another protection to the witness. Behind closed doors he can be coerced, tricked or confused by officers into making statements which may be untrue or may hide the truth by creating misleading impressions. While the witness is in the custody of the interrogators, as a practical matter, he is subject to their uncontrolled will. * * *" (1 L. ed. 2d at pp. 385, 386)

Furthermore, Mr. Justice Black pointed out that a person subject to an inquisition, not represented by counsel, would have no substantial chance of showing that his interrogators used improper means to elicit a statement from him in the face of the testimony of the officers that the statement was voluntary. (1 L. ed. 2d at p. 386)

The vitality of these observations is realistically present in the pages of the instant record. First, the Court below failed seriously to realize the import of the indictment. The opinion analyzes the indictment as one charging perjury in that petitioner testified falsely on the subject of incendiarism vel non, thus making the issue a true and false contest between the February statement of petitioner and his examination at the so-called arson trial, 96 S.E. 2d 476, at 477.

Yet, the indictment charged much more: "that Thomas Todd told him . . . on or about February 25, 1955, at Camp Lejeune . . . to say something that was not true and at the time threatened him . . . and told him . . . that he could be prosecuted with Preston Fleming unless he said what he, Thomas Todd, wanted him . . . to say; that he . . . had never read the aforesaid statement and could not read the said statement; that he did not tell Thomas Todd and Horace McLain, on or about November 4, 1955, that the aforesaid statement was true and that the same would be his testimony at the trial of Preston Fleming; that he . . . did not say anything about what his testimony would be at the trial of Preston Fleming . . ." (App. A)

After the pleader negatives all of the foregoing charges, the indictment charges that "the said Preston Fleming did willfully set fire to his 1951 Ford automobile on September 6, 1954; the statement given by Eddie Campbell, Jr., on February 25, 1955 . . . was true."

Thus, going to the proof in the instant record, while the state never proved the falsity of petitioner's testimony at the arson trial with reference to the cause

of the fire, by intermingling charges as to the alleged falsity of petitioner's testimony concerning the use by his interrogators of "improper means to elicit a statement from him in the face of the testimony of the officers that the statement was voluntary" (1 L. Ed. 2d 386), the conviction by general verdict was secured. Petitioner was defenseless against the testimony of Todd, McLlain and Wills "as to what was said and done at the secret inquisition." (1 L. Ed. 2d 385, 386).

The instant case requires a re-examination of the broad ramifications of the decision in *Groban*. It demonstrates graphically the result of complete adherence to its doctrine. Not only may a suspect be convicted on the basis of a statement given at such inquiry, but if he presumes to contest the voluntariness of any statement given, he may be subjected to trial for perjury with only his uncorroborated word as a defense against the forces of the state. Seen in this light, it is obvious that even the privilege against self-incrimination is clearly an inadequate substitute for the presence of counsel.

The citizen is on the horns of a dilemma. He must attend the investigation. He must give a statement. If the state distorts or falsifies his statement, he may be tried and the statement used against him. If he contests the voluntariness of the statement, he may be tried for perjury. This is quite simply the essence of totalitarianism.

It is not necessary, however, that this Court overrule *Groban* in order to protect the citizen and at the same time permit the state sufficient leeway in its investigatorial efforts. *Groban* was not concerned

with the admission of evidence obtained at a secret inquest. This Court recognized the possibility that abuse might occur and stated that such abuses might be corrected by excluding from subsequent prosecutions evidence improperly obtained. (1 L. ed. 2d, at p. 381) It is submitted that this doctrine properly interpreted would meet the desire of the dissenting justices to protect the citizen as well as the desire of the majority to prevent "investigatory proceedings" from becoming "unduly encumbered". If investigation is freely permitted, but with the limitation that the Due Process Clause bars the use of the statement secured without the benefit of counsel, each salutary goal is achieved. The evidence, or "lead", has been derived from the inquest and if crime is indicated, the state may then proceed before a grand jury. Due process is secured in its best sense in a critical area and the state not thwarted in its fire marshal hearing. Yet, the use of the statement to build conflict between the testimony of the accused and the officers is avoided and the prejudice engendered from the conflict itself is suppressed.

Re-examination of *Groban* requires the conclusion that the statement and the testimony concerning it can not be a basis for depriving petitioner of his liberty. The same conclusion must be reached in assessing the admissibility of the testimony of the agents concerning the November inquiry, since this interrogation was also conducted in secret while the petitioner was not represented.

It is no answer to these contentions to argue that petitioner did not ask for the assistance of counsel. The investigation was conducted by an agent of the State of North Carolina with the concurrence of a

Criminal Investigation Division agent of the Marine Corps. Petitioner was not entitled to counsel under the North Carolina statute (which closely resembles the Ohio statute), General Statutes of North Carolina (1950), Sec. 69-3. Neither was he entitled to counsel under military law. *Romero* v. *Squier,* 133 F. 2d 528 (C.C.A. 9). Hence a request for counsel by the boy would have obviously been a futile gesture.

B. Petitioner's testimony at the trial of Preston Fleming

Petitioner was called by the State to testify when the state solicitor knew that he had no case against the father-in-law in the absence of petitioner's testimony and when he had been informed by counsel for Fleming that petitioner would testify in favor of his father-in-law and contrary to the February statement. (See App. D infra) Under such circumstances in the Federal system it would appear that the court would not constitute a competent tribunal before which perjury could be committed. *United States* v. *Icardi,* 140 F. Supp. 383 (D.C. DC) Petitioner was not represented by counsel and was not warned of his state constitutional privilege against self-incrimination by the court or anyone else. The privilege was clearly available to him in view of the fact that he had been present at the time of the alleged arson and had made contradictory statements concerning the origin of the blaze in the months following the fire.

It is submitted that this testimony cannot be termed voluntary when given under these conditions and that, hence, its admission at petitioner's trial deprived him of liberty without due process of law. The early American cases recognized that the fact of examination before a magistrate, coroner, or grand jury had

a coercive effect, and the courts excluded admissions made by an accused because they were presumed to have arisen from the authority of the examining officer or body. *People* v. *McMahon,* 15 N.Y. 384 (1857); *People* v. *Mondon,* 103 N.Y. 211; 218 (1886); *State* v. *Matthews,* 66 N.C. 106 (1872); *Jackson* v. *State,* 56 Miss. 311, 312 (1879); *State* v. *Clifford,* 86 Iowa 550 (1892). Indeed, the validity of this type of compulsion was recognized by this Court in *Bram* v. *United States,* 168 U.S. 532.

In recent years the decisions have admittedly departed from this principle, primarily seeking evidence of physical coercion, "relay tactics" of questioning, or unlawful inducement in determining the voluntariness of a statement, e.g., *Lyons* v. *Oklahoma,* 322 U.S. 596; *Watts* v. *Indiana,* 338 U.S. 49. However, this Court in this term has again asserted the undeniable fact that a statement may be involuntary where there is no physical coercion or unlawful inducement. *Fikes* v. *Alabama,* 352 U.S. , 1 L. ed. 2d 246, decided January 14, 1957.

In *Fikes* the evidence that the accused was interrogated intermittently for a week in a state prison away from his home, that his father and lawyer were not permitted to visit him, that he was kept in isolation, and that he was not provided a speedy preliminary examination before a magistrate, was determined by this Court to establish as a matter of law that both of his confessions were involuntary, although the accused did not take the stand to contest the voluntariness of the confessions.

See also, *In re Oliver,* 333 U.S. 257; *Leyra* v. *Denno,* 347 U.S. 556. *Fikes* also affirms the proposition that special attention must be given to the mental and

emotional status of a particular accused in assessing voluntariness. (1 L. ed. 2d, at p. 250)

In the present case it is submitted that when petitioner, a young colored Marine, was summoned by officials of the State of South Carolina, brought to the courthouse in his home town, and asked questions concerning the alleged guilt of his father-in-law without any warning that he possessed the right to remain silent, and without any counsel to represent him, the testimony which resulted was not voluntary. Under similar circumstances courts have recognized that testimony of this type can only be regarded as compelled. *State* v. *Byington,* 114 Utah, 388, 200 P 2d 723 (1948); *People* v. *Maloy,* 204 Mich. 524, 170 N.W. 690 (1919); *State* v. *Caperston,* 276 Mo. 314, 207 S.W. 795 (1918); *United States* v. *Bell,* 81 Fed. 830 (C.C., 1897). These courts have noted, as did the dissenting justices in *In re Groban, supra* (at p. 388), that the average witness has little or no idea as to when or how to raise any of his constitutional privileges.

Other courts have held that ordinarily the mere absence of a warning does not require the result that the testimony is compelled, but recognize that in an unusual case the testimony may be involuntary. *United States* v. *Block,* 88 F. 2d 618 (C.C.A. 2), cert. den. 301 U.S. 690.

Petitioner is aware of the prior decisions of this Court in which it has been held that a witness waives his privilege against self-incrimination unless he asserts it and that there is no duty to inform a witness that he possesses the privilege. *Rogers* v. *United States,* 340 U.S. 367; *United States* v. *Monia,* 317 U.S. 424; *United States ex rel. Vajtauer* v. *Commissioner*

of Immigration, 273 U.S. 103; *Powers* v. *United States,* 223 U.S. 303; *Wilson* v. *United States,* 162 U.S. 613. Petitioner does not challenge these principles of law as applied to the facts of those cases. Petitioner's contention is simply this: Although a trial court may not be *required* ordinarily to inform a witness that he may not be compelled to incriminate himself, *if it does not,* and the evidence establishes that the officiality of the interrogation, and the majesty of the tribunal before which he has been summoned, combined with youth, inexperience and total absence of legal advice, compels the witness to speak where he otherwise would have remained silent, then his testimony is involuntary and cannot be used against him without depriving him of liberty as protected by the Fourteenth Amendment. Cf. *Bram* v. *United States,* 168 U.S. 532.

Judged by this standard, petitioner's testimony at the trial of *State* v. *Preston Fleming* clearly was involuntary and hence could not be used as a basis for his conviction of perjury.

Its introduction at the perjury trial was assigned as error in the Court below and by-passed as without merit; the transcript of the examination was objected to at trial at least on other grounds (Tr. A 13); specifically assigned on motion for new trial (App. D); cf. *Hubbard* v. *Rowe,* 192 S.C. 12, 5 S.E. 2d 187 (1939).

The least that may be said about a proceeding of this nature is that the state was morally an aider and abettor in the perjury charged. *State* v. *Caperston, supra.*

CONCLUSION

It has been contended that the evidence upon which petitioner's guilt was predicated was inadmissible and can not serve as the basis of his conviction. It seems clear that the protection guaranteed to petitioner by the Due Process Clause of the Fourteenth Amendment has been violated. The February statement at the fire marshal inquest was wrongfully procured and then wrongfully used in the examination at the arson trial. On both occasions petitioner was denied assistance of counsel and protection against self-incrimination. The procedure thus used by the state to make a perjury case, under the facts, is revolting to the sense of fairness inherent in due process. A conviction of perjury upon this evidence offends against that which is "implicit in the concept of ordered liberty". Cf. *Palko* v. *Connecticut,* 302 U.S. 19. The judgment of the Supreme Court of South Carolina affirming petitioner's conviction for perjury should not be permitted to stand.

For the foregoing reasons, the foregoing petition for writ of certiorari should be granted.

Respectfully submitted,

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